

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

SOUTHERN CALIFORNIA EDISON COMPANY^{1[1]}

Employer

and

Case 21-RC-21-21060

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 47, AFL-CIO-CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Southern California Edison Company, herein, the Employer, operates the San Onofre Nuclear Generating Station (SONGS) in San Clemente, California. On July 2, 2008, the International Brotherhood of Electrical Workers, Local 47, AFL-CIO-CLC (herein the Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act (herein, the Act), seeking to represent a unit of 21 "Supervisor 2/Planners" employed by the Employer at SONGS in the mechanical planning, electrical planning, test technician/HVAC planning, and the instrumentation and control planning groups. On July 15, 2008, a hearing in this matter was held before a hearing officer of the National Labor Relations Board (herein, the Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

The Employer argues that all members of the proposed unit are supervisors as defined in Section 2(11) of the Act because their planning functions amount to assignment and responsible direction of the craftsmen who carry out the work orders. In

^{1[1]} The Employer's name appears as amended at the hearing.

the alternative the Employer contends that, if the planners are not found to be supervisors, 9 of the 21 planners function as "supervisors" during a portion of their time, which is sufficient to exclude them from the planners' unit are supervisors.

I have considered the evidence and the arguments presented^{2[2]} by the parties. As discussed below, I conclude that the Employer has failed to establish that any of the 21 planners are supervisors. Accordingly, I have directed an election in the petitioned-for unit which is composed of the 21 planners.

I. The Employer's Operations

The Employer produces and distributes electricity at the SONGS facility, located in San Clemente, California. The Maintenance and Construction Services Performance Planning and Procedures Group (herein, maintenance and planning group), led by Manager James Joy, is part of the maintenance function at the plant. Among those reporting directly to Manager Joy in the maintenance and planning group are Supervisor of Mechanical Planning William Hermanns, and Supervisor of Electrical and Instrumentation and Control Planning Dave Knollin. All of the 11^{3[3]} mechanical planners report to Mr. Hermanns. The five^{4[4]} electrical planners, two^{5[5]} test tech and HVAC planners, and the four instrumentation and control planners, all report to Mr. Knollin. All of the Planners in question are classified as Supervisor 2/Planners (herein, "planners"). This classification and organizational structure was installed on October 22, 2007.

^{2[2]} Only the Employer filed a post-hearing brief.

^{3[3]} Two of the mechanical planners are on temporary work assignments (TWA) in the department and are expressly excluded from the unit the Petitioner seeks to represent.

^{4[4]} One electrical planner recently hired, Tony Krass, is missing from the organizational chart, which is Employer's Exhibit 1. One electrical planner is excluded from the unit because he is a non-employee, as designated by the "AC", for agency contract, next to his name.

^{5[5]} Two of the individuals listed on the organizational chart are AC and are not part of the proposed unit.

II. The Work of Planners

A. Role of Planners Prior to October 22, 2007

Prior to October 22, 2007, planners were simply classified as Supervisor 2 and were not part of a centralized Maintenance and Planning Group. Prior to October 22, 2007, all Supervisor 2s “wore two hats”: they engaged in planning and also served as “first line supervisors”^{6[6]} for the craftsmen who carry out the maintenance and repair work on the facility’s equipment.

The planner who testified at the hearing recounted that prior to October 22, 2007, under the old system, he’d spend 60-70% of his time directly supervising craftsmen, and the remainder of his time performing his planning functions. In this regard, he decided, along with the general foreman, which projects would be performed by which worker, based on the workers' qualifications and availability. He then assigned work orders to the employees, reviewed the orders with them to make sure they were understood, and ensured that all necessary safety precautions, as well as the work orders themselves, were followed. Under the prior system, he also prepared performance evaluations for those craftsmen who reported to him.

B. Current Duties of "First Line Supervisors"

In the present organizational structure, (adopted October 2007), first line supervisors, (who, like planners, classified as Supervisor 2s), are directly responsible for the supervision of the craftsmen who perform the work set forth in the work orders created by the planners. First line supervisors do not engage in planning. First line supervisors perform all of the usual administrative work associated with oversight of the

^{6[6]} The record does not indicate whether first line supervisors are currently represented by a labor organization. They are not included in the proposed unit.

craftsmen's work, including job assignments, allocating employees and materials to projects, hiring, firing, adjusting grievances, assigning overtime, approving time-off requests, reinforcing rules, directing employees, preparing performance evaluations, and generally ensuring that employees complete their work correctly and on schedule.

C. The Current Duties of Planners and the Planning Process

The manager of the maintenance and planning group, James Joy, testified that since the planning department was centralized on October 22, 2007, the overall focus of the planners' work has been on improving the quality and accuracy of the written work instructions. Thus, the record reflects that since October 2007, the planners no longer perform the direct oversight of craftsmen since those functions are now assigned to those who are specifically designated "first-line supervisors" as is described above.

The planning process within the maintenance and planning group begins when Mr. Hermanns and Mr. Knollin receive reports of machinery or equipment requiring repair or maintenance. Hermanns and Knollin will first consider whether they are accurate, and they then determine the priority^{7[7]} of each item. Hermanns and Knollin then distribute the maintenance orders to the planners under their supervision.

Once the maintenance orders are distributed, the planners begin work on them based upon the priority already assigned, the scheduled date for the work, and their own prioritization of the less critical and non-critical projects. When a planner begins to work on a planning assignment, he first goes to the plant to observe the deficiency, verify the validity of the report, determine what other considerations may be at issue (such as a need

^{7[7]} The priority of a maintenance order will primarily depend upon whether the particular item of equipment is categorized as critical alpha (the equipment considered the most important to plant reliability), critical bravo, or non-critical (the least important). The critical alpha and critical bravo items are a higher priority than the non-critical.

to move other equipment or to build scaffolding), and he then determines, using his own knowledge and experience, whether the scope of the project is correctly described.

At this time, the planner may decline the job if he finds that the issue is not valid, or he might increase the scope of the job if it is more complex than previously described. After the problem is validated, the planner returns to his office to begin the process of creating a detailed, written work plan. Under the rules and regulations of the Nuclear Regulatory Commission, no such work can be performed without a written work instruction such as those created by planners. The planner then assembles the documents which he will need to create a comprehensive written plan for the completion of the project, such as drawings, procedures, or vendor manuals.

The record reflects that about 35 percent of the orders authored by the electrical planners are routine in nature. The record also reveals that routine and corrective maintenance projects can require creativity on the part of a planner, such as devising some sort of custom work. In instances when there is a procedure already in place, the planner will start with that and create a custom plan if needed. According to the record, a custom plan is needed most of the time.^{8[8]} The record reveals that 25 percent of the projects authored by the planners on the mechanical side are for routine preventative maintenance which are generated from a stored data base. The remaining mechanical projects for corrective maintenance are not routine in nature and the mechanical planners use design codes as dictated by the American Society of Mechanical Engineers in creating these work orders.

The record disclosed that several aspects of the work orders created by the planners are boilerplate, including the "Requirements, Precautions, and Work Plan

^{8[8]} It was estimated to be about 65 percent of the time.

General Instructions" sections. The scheduling portion is done by someone other than the planner, as the only aspect of the work plan that is created by the planner is the "Work Plan Detail," in which the planner drafts detailed instructions based upon his experience with the particular type of work and based on the information he has gathered.

As part of the planning, the planner must also calculate the number and types of man-hours needed to complete the work and he order the parts needed for the work. The planner has the authority to order parts as needed, so long as the price of any one part does not exceed \$10,000.^{9[9]} The resulting work order is usually between 6 and 20 pages in length and serves to provide the craftsman performing the work, guidance and detailed instructions so that the craftsman can perform the work without any error.

D. Post-Planning Process Duties of Planners

Once a work order is completed and entered into the database, it is reviewed, either by the planner's supervisor or through a peer review process. Approximately 10 percent of the work orders require changes before they are approved.

Once the work order is approved and scheduled, it is assigned by one of the first line supervisors to a craft employee. The planner is not involved in the selection of the craftsman for the job. Before the craftsman begins working on the project, he receives a pre-job brief from his first line supervisor to ensure that he understands the assignment. The planner who created the work plan is not required to be present at the pre-job briefing.^{10[10]} The record reflects that craftsmen, under the oversight of the first line supervisors, then follow the instructions detailed in the work order provided.

^{9[9]} For any part that costs over \$10,000, the Planner only need ask his supervisor to approve the purchase in the computer. The supervisor apparently always agrees to do.

^{10[10]} Hermanns stated that the Planners under him usually participate in pre-job briefings every day, taking up about 5% of their work time.

The record reveals that at times, planners go into the field to monitor the work on projects they planned. This part of their job duties takes up as much as 10 percent of their time and is more likely to occur when the project is complex or is very important. Supervisor Hermanns testified that he expects his planners to be in the field for 1-2 hours per day, monitoring the work so as to ensure that the technical aspects are performed as planned.

When engaged in this monitoring, the record discloses that the planners may intervene and provide verbal direction to the craftsmen. The record also reveals that at times^{11[11]}, a first line supervisor may request that the planner who wrote the order to be onsite.

The record described that in instances of “monitoring” the planner will talk to the craftsmen and to their first line supervisors to make sure that the project is going according to plan. A planner does this to learn whether or not any difficulties have arisen due to an oversight in the planning process. One planner estimated that he engages in such monitoring only once every 2 months, and that while he interacts with craft employees on those occasions, he does not direct the work of the craftsmen. If the planner notes an issue that needs to be raised with a craftsman, the planner testified that he will communicate his concern to the craftsman’s first line supervisor.

When a job is completed, the work order is returned to the planner who reviews the documentation to verify that the work was done according to plan. At times, a planner will have to go back to craftsmen to obtain missing signatures or documentation. If a work step was not completed, the planner may direct that the craftsman to go back and do it.

^{11[11]} The record does not disclose how frequently this occurs.

E. Planners Participation in Hiring

In February or March 2008, the record reveals that two planners were assigned to a "hiring panel." According to the record, this was the first time that planners had been included in a hiring panel. In this capacity, the two planners and a supervisor interviewed applicants and they then each assigned a numerical score for each applicant. According to the record, the applicants' scores were then averaged and submitted. The record discloses that the planners who participated did not render a recommendation as to whether or not to hire any applicant. Their roles were limited to interviewing and assigning a score to each applicant. The record failed to disclose how the ultimate hiring decision is made or the weight that is accorded to the scores generated by the interviewers.

F. Planners Get Supervisory Training

Planners are expected to complete "supervisory training" as part of their overall training. The record revealed that the Employer confers this training^{12[12]} because planners will at times be assigned to directly supervise craft employees as first line supervisors. In this regard, planners are expected to attend monthly "All Leader Meetings", to which only supervisors are invited.

G. Premium Pay For Planners

Planners are salaried, exempt employees who do not earn premium overtime pay unless they are working overtime directly supervising employees who are also earning overtime premium pay. Thus, planners only earn overtime pay if they are assigned to work as first line supervisors in oversight of the work of the craftsmen.

^{12[12]} The training includes familiarizing them with work-place laws and regulations, as well as general dealings with the work force.

H. Planner Liability for Problems in Execution of Work Orders

The record reveals that when something goes wrong in the performance of a work order, the planner may be held responsible for the mishap. Thus, the planner is ultimately responsible for the directives contained in his project plan, so that if the mishap was caused by incomplete or incorrect directives in the plan, the planner will be held accountable. The record also discloses that if the mishap was the result of the failure of the craftsmen to execute the work as directed in the work order, then the craftsman and/or his supervisor will be held accountable.

I. Planners Work as First Line Supervisors

The record reveals that planners sporadically are assigned to act as a first-line supervisor. When this occurs, the planners are not required to fill out detailed timesheets which account for the time that they function as a first line supervisor. Thus, the frequency of these assignments is not precisely measured.

The record does reflect that since October 2007, there was one "scheduled outage" which occurred in December 2007, when the plant was shut down. In addition, the record reveals that the plant may be shut down unexpectedly because of an equipment breakage. According to the record, the un-planned outages occur once or twice per year and usually last for less than seven days.

The planned outages, such as the one in 2007, occur about once every 18 months. The most common reason for the planned outages is for refueling, which requires that the plant be shut down for 35-60 days.

The record reflects that during the planned outage in November 2007, some of the planners were utilized as first line supervisors to monitor the work because the schedules

were compressed and the usual group of first line supervisors were insufficient to monitor all of the work that was being performed. Thus, some of the planners were used to verify that work was being performed correctly and in this regard, they dealt with any issues that came up. The record indicates that, other than the instance in November 2007, the Employer does not have specific plans to continue to use the planners as first line supervisors during planned outages.

1. First-Line Supervisory Work Performed by Individual Planners Since October 22, 2007:

- Since October 22, 2007, Joe Falvey, a lead planner, has worked as a first line supervisor for about 20 percent of his working time, including supervisory work he performed during the November 2007 planned outage. He also engaged in monitoring the work on critical-type projects he planned and filled in recently for the first line supervisor of the boiler and condenser area for a 3-day period. As Falvey did not testify, the record contains no further details about what tasks or duties he performed while he filled-in for the first line supervisor or how he actually carried out his oversight of the work.
- Jerry French worked as a first line supervisor during much of the November 2007 scheduled outage. While French did not testify, there was testimony in the record that he often goes into the field to monitor work, especially generator work, which he monitors very closely. The record contains no further details about what tasks or duties he performed while functioning as an acting first-line supervisor, how often he did them, or how he carried them out.
- During the November 2007 scheduled outage, Tom Gaikowski monitored the work of craftsmen very closely as he worked as a

“project manager” for that entire time period. In this role, he made job assignments, directly supervised craftsmen, planned, ordered parts, and addressed the many emergent issues that arose. Gaikowski did not testify, nor did any other witness provide any details about how he made these assignments and what his direct supervision of craftsmen entailed.

- Paul Gibson monitored the work of contract workers working on a modification project for approximately 36 hours.^{13[13]} This monitoring included observing welding work performed by these outside vendors and to ensure that the work was done according to SONGS’ procedures. When work is being performed on sensitive equipment by outside vendors, the work must be monitored by a SONGS supervisor. According to Hermanns, if there was any direction to be provided these non-employees, Gibson would have directed it to the vendor’s supervisor or the general foreman who was overseeing the work. Hermanns also testified that Gibson had authority to direct the vendors’ supervisors, such as directing them to stop work in the event there was a dangerous situation at the plant.
- During the November 2007 scheduled outage, after his planning work was complete, Chuck Murico (who did not testify), monitored 10-20 contract workers for approximately half of each workday, to make sure that they performed their work correctly and in accordance with plant procedure. This work was repetitive maintenance activities, such as moving and testing components. The first line supervisor for these workers was present during some portion of the time Murico performed this monitoring. According to the record,

^{13[13]} Hermanns stated that Gibson worked two hour shifts, six days per week, for a three-week period.

Murico's primary duties were to ensure plant and worker safety and to stop work if there was a problem. The records states that it was conceivable that Murico could be held responsible if there was a problem, but there is no evidence that there were any problems.

The record also disclosed that as a lead employee, Murico has also, at times, filled-in for his supervisor, Hermanns. When he fills in for Hermanns, Murico distributes/assigns work to his fellow planners, supervises their work, and performs any other work that Hermanns would normally do. Murico recently did this for 2 weeks in June 2008 while Hermanns was on vacation. Murico did not testify, nor did any other witness provide details about exactly what Murico did while filling in for his supervisor or how he carried out these duties. Including the monitoring during the outage, it was estimated that Murico spent about 10% of his overall time since October 2007, providing "first line supervision."

- Ed Rashad (who did not testify), was said to have performed first line supervision 10% of his working time during the relevant time period. Rashad worked closely with first line supervisors, performed a great deal of monitoring in the field, and assisted with the boiler and condenser work. Rashad filled-in for the first line supervisor in the boiler and condenser group for three days.^{14[14]} For a week and a half, he acted in this capacity on another project, addressing issues and making sure that the work was done safely and correctly.^{15[15]}

^{14[14]} The record is unclear about when this occurred, except that it occurred between October 22, 2007 and the date of the hearing.

^{15[15]} The record is unclear about when this occurred, except that it occurred between October 22, 2007 and the date of the hearing.

- Buck Walton (who did not testify), does monitoring and some first line supervision, amounting to what was estimated to be approximately 15% of his work time since October 2007. During a recent unscheduled, forced outage, Walton engaged in both planning and first line supervision in order to get the plant running again. When acting in the capacity of a first line supervisor, Walton was described as responsible to ensure that the work was being done correctly, and responsible for redirecting any worker he saw performing work incorrectly. According to the testimony in the record, this amounted to half of his work time during a 1-week period. The record also discloses that Walton was the night shift machinist supervisor during a recent unscheduled outage^{16[16]} and made job assignments, ensured adequate resources were allocated to the project, and ensured that deadlines were met. Walton has also engaged in some training. The record does not contains any further details about what tasks or duties he performed, how often he did them, or how he carried them out.

Electrical and other Planners under Knollin

- Ed Cavanaugh (who did not testify) worked as the first line supervisor for the electricians on the swing shift during the scheduled November 2007 outage. He served in this capacity for about 60-70 days and this direct supervision of craft employees took up about 65-70 percent of his time. The record reveals that he normally works as the swing shift planner and “frequently”^{17[17]} fills in when the first line supervisor is out or occupied with other work. While the plant is online, he performs the usual first line supervisorial duties, including delivering

^{16[16]} Its is not clear from the transcript which outage was referred to here, but it appears that it was the one from late October 2007 through late January 2008.

^{17[17]} This frequency is not quantified.

performing pre-job briefs, assigning work directly to craft employees, dealing with any discipline or grievance issues that might arise. No additional detail about this work was provided. Between online time and outages, it was estimated that 20 percent of Cavanaugh's work time since October 2007, was consumed by first line supervision duties.

- Hung Le (who did not testify) was said to spend about 50 percent of his time performing first line supervisory work both during outages and when the plant is online. During the scheduled November 2007 outage, Le had craft employees assigned directly to him. He assigned work to them, and took their grievances (to the extent they had any). During this time, he primarily supervised the work of HVAC employees. The record is devoid of any further details about Le's performance as an acting first line supervisor.
- Including work performed during the outage, it was estimated that Tim Isaacs (who did not testify) spends 30 percent of his time performing first line supervision work. During the scheduled November 2007 outage, he worked as a project manager, and in that role, assigned work to craftsmen, would have been responsible for disciplining employees had discipline been needed, assigned overtime, accepted and granted requests for time off, and otherwise functioned as a first line supervisor normally would. After the scheduled outage, according to the record testimony, he continued to occasionally supervise the employees engaged in a water control system project. In this role, he engaged in the same supervisory tasks as during the outage. Isaacs did not testify and no further details were provided about any assignment or other specific duties Isaacs does or

has performed. Isaacs has also been involved in a small amount of on-the-job training.

Legal Standard and Analysis

Section 2(11) of the Act provides the statutory definition of the term “supervisor” as:

[A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise is not of a merely routine or clerical nature, but requires the exercise of independent judgment.

This definition is read in the disjunctive, so a putative supervisor with the authority to engage in any one of these enumerated powers is a statutory supervisor, provided their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and their authority is held “in the interest of the employer.” *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001). The burden of establishing that a putative supervisor exercises one of these powers and is a supervisor, excluded from the protections of the Act, rests upon the party so alleging, and must be met with more than mere conclusionary statements. *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 7 (2006). The evidence must show by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, 348 NLRB slip op. at 11, (citing, e.g. *Dean & Deluca*, 338 NLRB 1046, 1047 (2003)). The Employer’s primary argument is that all of the planners are statutory supervisors because, through the comprehensive work orders they create, ultimately carried out by craftsmen, they engage in assigning and responsibly directing the work of these craftsmen.

A. Assignment

When a supervisor engages in assignment, he effects the terms and conditions of an employee by designating that employee to a place (such as a location or department),

by appointing an employee to a time (such as a shift or an overtime period) or by giving significant overall duties or tasks to an employee. *Oakwood*, above slip op. at 4. If a putative supervisor engages in at least one such form of assignment, and in doing so exercises independent judgment, he is a supervisor.

1. Planners do not Assign Workers to a Place By Virtue of Their Planning Activities

Assignment to a place encompasses the particular location, department, or wing an employee will work in during some period of time. *Ibid.*. Here, there is no specific evidence that any of the planners directly assign or effectively recommend the assignment of other employees to a particular work location. The work orders created by the Planners certainly indirectly result in a craftsman being assigned to work on equipment in one location or another within the plant, but there is no specific evidence that any planners have any involvement in determining whom will carry out which work order. Rather, the first-line supervisors are charged with distributing the work orders to the craftsmen. There is no evidence in the record that planners make any specific recommendations to the first-line supervisors as to which craftsman should perform any particular task. There is no evidence in the record as to how the first-line supervisors go about making any such decisions. As such, there is not evidence that planners engage in the assignment, or effectively recommend the assignment of, other employees to a particular work location.

2. Planners do not Assign Workers to a Time By Virtue of Their Planning Activities

Assignment of an employee to a time includes scheduling employees for shifts

(such as day or night), otherwise requiring an employee (such as one who is off duty or on-call) to report to work at a certain time, or by requiring (as opposed to requesting) an employee to work overtime. *Golden Crest*, above slip op at 4-6. There is no evidence that the Planners engaged in the scheduling of employees for one shift or another, called employees to report to work, or required employees to work overtime. There is evidence that at some point in time, Planners received overtime premium pay when they directly monitored or supervised the work of other employees, whom were receiving overtime premium pay. There is no evidence, however, that Planners ever required employees to remain at the plant and work overtime, or that they even had the authority to do so. Though the work orders created by the planners anticipate the need for a certain amount man hours from certain categories of craftsmen, there was no testimony that the planner was involved in the scheduling of such workers and the determination of the time at which they would perform such duties. As such, there is no evidence that the planners assigned other employees to any particular time.

3. Planners do not Assign Workers to Significant Overall Duties By Virtue of Their Planning Activities

The assignment of significant overall duties or tasks is distinguished from an ad hoc instruction to an employee to perform a discrete task. *Oakwood*, above slip op. at 5. Here, the planners create highly-detailed written work orders for maintenance, repairs, and other work to be performed on equipment and systems in the plant. The work orders are distributed the craftsmen who perform the work by their first line supervisors. Though such work cannot be completed, under Nuclear Regulatory Commission regulations without written work instruction such as those created by planners, there is no specific evidence in the record of any planner's involvement, in the regular course of their work,

in the assignment of these work orders or any other tasks which might be considered the assignment of overall duties. The fact that the planners' detailed work orders provide step-by-step instructions for the work eventually performed by a craftsman is not analogous to the charge nurses in *Oakwood* who assigned a particular employees to care for specific patients during a particular shift. Slip op. at 13. The evidence does not show that the Planners engaged in or had authority to effectively recommend, the assignment of significant overall duties or tasks to other employees.

4. There is Insufficient Evidence that Planners Act with Independent Judgment

Assuming arguendo that the planners engaged in assignment of other employees, it must also be shown that they exercised independent judgment in doing so. When independent judgment is exercised, a person acts upon their own judgment and discretion, free of the control of others. *Oakwood*, above slip op. at 9. The discretion involved in such judgments rises above that which is "merely routine, clerical, perfunctory, or sporadic" in nature. *Id.* at 10. Judgments that are dictated or controlled by detailed instructions, be they company policies or rules, verbal instructions of a superior, or the provisions of a collective-bargaining agreement are not independent. *Ibid.* The Employer urges that because planners exercise a great deal of discretion in creating work orders, they act with independent judgment through the plans that are ultimately assigned to and carried out by other employees. Even assuming arguendo that the planners' work orders amounted to "assignment," this argument mistakenly equates the use of one's knowledge and expertise in carrying out one's general job duties with the use of one's own knowledge and experience when weighing the skills and abilities of various employees

and the demands of certain work assignments and determining which employee will be assigned to which shift, work area, or project.

B. Responsible Direction

A person “directs” another if he decides “what job shall be undertaken next or who shall do it.” *Oakwood*, above slip op. at 7. Such direction is “responsible” if the person is held accountable for the performance of the work under their direction. *Ibid*. Such accountability means that the directing individual is expected to take corrective action if there are any deficiencies of the part of the persons performing the work under their direction. *Ibid*. Failure to make such corrections or otherwise ensure the proper performance of the work may result in suffer some adverse consequence for the individual engaging in responsible direction. *Id.* at 8. As with assignment, responsible direction must involve the exercise of independent judgment if it is to bestow supervisory status.

1. Planners Marginally Direct the Work of Others

As noted above, direction involves a determination of “what job shall be undertaken next or who shall do it.” As noted by the Employer, “direction”, unlike “assignment” may consist of ad hoc instructions to perform discrete tasks. *Oakwood*, above slip op. at 6. The record shows that most, if not all, of the planners at SONGS perform some monitoring of the work done pursuant to the work orders they create. The evidence shows that this monitoring serves to ensure that the work is carried out correctly and safely. As part of this monitoring, a planner may intervene and correct an employee who is performing a task incorrectly. When a project is completed, the work orders are turned in to the planners who examine the paperwork to ensure that all of the steps in the

work were completed and that all necessary signatures documenting the completion of the work are present. If the planner sees that a step was not completed or a signature is missing, he can instruct the craftsman to perform the step or to obtain the signature. In this limited sense, thus, the planners engage in some direction of employees as part of their regular duties.

2. Planners Are Not Accountable for the Performance of the Work they Direct

As noted above, “direction” is not “responsible” unless the individual providing the direction is actually held accountable for the performance of that work. The distinction, the Board explained in *Oakwood*, is that “the concept of accountability creates a clear distinction between those employees whose interests, in directing other employees' tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task.” Above, Slip op. at 8. The accountability discussed in *Oakwood* and its companion cases is not of a generic type, but, rather requires specific evidence of the consequences that the putative supervisor will or may suffer if he fails to take the corrective action necessary to ensure that the directed employee(s) perform the work correctly. *Ibid.* Evidence that an employee is held responsible for his own job performance, as opposed to that of others, is not evidence of responsible direction. *Id.* at 11

Here, the limited direction that the planners provide in the regular course of their work is not “responsible”, as they are not directly held responsible for the correct performance of the work of the employees to whom they provide direction. It is repeated several times throughout the record that the planners are ultimately held responsible for

insuring that the work [done pursuant to the work orders they create] is performed in a manner that is technically correct. There are several specific examples offered which in which planners were purportedly held responsible for the craftsmen's' non-technically correct performance or other problems that arose in the performance of work orders they created. For example, it was noted that one planner received a verbal counseling (he was admonished to pay greater attention to detail) for underestimating a project he planned when it could not be completed according to the work order he planned. Also, a HVAC planner neglected to, as part of the planning process, ensure that certain permits were in place or even noted in the work order. Though the first line supervisor and the craftsman performing the work also failed to notice the permit issue, only the planner was issued a corrective action document, resulting in a verbal counseling. Neither the craft employee nor the first line supervisor, who also could have caught the deficiency, was disciplined. These two examples of "accountability" show that the planners were liable for the errors or oversights in their own work, not that of the craftsmen actually performing the work specified in the work orders. As such, the Employer has failed to meet its burden that the direction provided by its planners is "responsible."

3. There is Insufficient Evidence that Planners Act with Independent Judgment

Assuming arguendo that the planners did, as part of their regular duties, engage in or effectively recommend the responsible direction of others, whether it was undertaken with independent judgment would have to be considered. As noted above, a person exercises independent judgment when he acts upon his own judgment and discretion, free of the control of others. *Oakwood*, above slip op. at 9. There was no evidence presented

as to *how* the planners determined that a craftsman was performing work improperly or otherwise needed correction or redirection. The planner engaged in monitoring might have noticed that a craftsperson was failing to follow the instructions contained within the work order, but such an observation would hardly require independent judgment. Even though the planner himself created this plan using independent judgment, his caution to a craftsman that he was failing to follow the written directions would be more of a routine or sporadic type which does not involve the exercise of independent judgment.

C. Secondary Indicia is not Sufficient Here to Establish Evidence of Supervisory Status

Secondary indicia of supervisory status, including “the perceptions of other workers and attendance at management meetings, may support a finding of supervisory status. *Entergy Gulf States, Inc. v. NLRB*, 253 F. 3d 203, 209 (5th Cir. 2001). Where the evidence fails to indicate by primary indicia that a putative supervisor possesses even one of the primary indicia of supervisory status enumerated in Section 2(11), however, the party alleging supervisory status may not establish it through secondary indicia alone. *Ken-Crest Services*, 335 NLRB 777, 779 (2001). The Employer urges that the planners be deemed supervisors by virtue of their job title (which is, at least in part, shared with what appears to be a concededly supervisory position), the perception that planners and first line supervisors are of equal status, the similar pay rate of first line supervisors and planners and the fact that their rate of pay for both positions is higher than that of craftsmen, planners are invited to trainings and meetings intended for only supervisory employees, that some planners provide training to craft employees, and that two planners

participated in a recent hiring panel. As noted above, the Employer may not use secondary indicia to prove supervisory status in this case, as supervisory status through primary indicia has not been established.

D. There is Insufficient Evidence Showing that 9 of 21 Planners Regularly Engage in First-Line Supervisory Duties

While the Board has not set a specific minimum percentage of one's work time must be spent performing supervisory duties before a putative supervisor is considered a statutory supervisor, but 10-15% of one's time has been held to be sufficient to find the individual was a supervisor. *Oakwood*, above slip op. at 11. When an individual spends part of his work time engaged as a supervisor, it must be determined whether a regular and substantial portion of his work time performing supervisory functions. *Ibid*. Regular means according to a pattern or schedule, as opposed to sporadic substitution. *Ibid*. There is no evidence indicating that even one planner engaged in any supervisory duties according to a pattern or schedule, as opposed to sporadic substitution. As noted above, it is the burden of party asserting supervisory status to provide details sufficient specificity to show that the putative supervisor actually exercised or (effectively recommended) such supervisory status.

1. Mechanical Planners

Of the eleven regular planners in Mechanical Planning Department, the Employer argues that six are statutory supervisors by virtue of the approximately 10-20% of their work time spent performing first-line supervisory duties and the approximately 5% of their time spent in pre-job briefs.

Three of these planners, Joe Falvey, Chuck Murico, and Buck Walton are considered lead planners. The record is devoid of specific details indicating that Falvey

ever actually exercised or had the authority to exercise any of the enumerated supervisory duties when he engaged in monitoring, first-line supervision and/or participated in pre-job briefings for as much as 25% of his time. Similarly, there are no specific details indicating that Murico actually exercised or had the authority to exercise any of the enumerated supervisory duties when he monitored outside contractors during the outage or filled in recently for Supervisor of Mechanical Planning Hermanns. Though the record indicates that Murico made assignments to his fellow planners in Mr. Hermanns' absence, there is no evidence about specific assignments Murico made or how such assignments were made. The conclusionary testimony that Murico "made assignments" to other employees is insufficient to prove that he acted as a supervisor. The record is similarly lacking in specific, non-conclusionary testimony about the "job assignments" Walton made while acting as a first-line supervisor during various outages. None of these three leads, therefore, has been proven to be a statutory supervisor by virtue of the alleged supervisory work they perform for some percentage of their work time.

The Employer also argues that three other mechanical planners - Jerry French, Tom Gaikowski, and Ed Rashad - are supervisors, based upon their monitoring and first-line supervision during outages and otherwise. With French, there were no examples given of the ways in which he exercised supervisory duties during the November 2007-January 2008 planned outage, or of what his close monitoring of certain types of work consisted of. With respect to Gaikowski, the record indicates that he monitored certain work very closely and made job assignments during a recent outage in a project management role. There are no details, however, of what type of job assignments he made or how he made them. As discussed above, Gaikowski's recent single experience

on a hiring panel also fails to establish supervisory status, given that there is no evidence that he specifically recommended or effectively recommended an applicant for hire.

With respect to Rashad, the evidence suggests that he worked closely with first line supervisors during outages and at other times, but there is no evidence that he engaged in or had the authority to engage in any specific supervisory duties. In fact, the record indicates that Rashad did not assign or direct any employees to work on the project, but just “worked closely” with them once the first-line supervisor made such assignments. As such, the Employer has failed to meet its burden of showing that any of the eleven Mechanical planners were supervisors by virtue of their actual exercise or possession of supervisory authority.

2. Electrical Planners

The Employer also urges that three planners in the electrical and instrumentation and control planning department - Ed Cavanaugh, Hung Le, and Tim Isaacs- be excluded from the bargaining unit based upon their exercise of supervisory duties. Although there is evidence that Cavanaugh spent a portion of his time during the scheduled November 2007 outage performing first line supervision, as was the case with the other planners, there is no specific evidence that he actually performed any supervisory duties during that time period. The conclusionary statements regarding his duties when he filled-in for or helped-out the first line supervisor on the swing shift do not prove that he actually performed any “assignments” or other supervisory duties. Le’s duties are similarly only drawn in broad strokes, without any specific examples to support the Employer’s argument that he regularly spends a significant portion of his time engaged in supervisory work.

Finally, with respect to Isaacs, it is stated that he worked as a project manager. As noted above, this title is never explained in the record. While it is asserted in the record that he engaged in a variety of supervisory duties during the scheduled November 2007 outage, and at other times since then, as needed, the record presented is insufficient to establish that he actually possessed supervisory authority or that he functioned as a supervisor.

In sum, the record presented is insufficient to support a finding that *any* of the planners engaged in any one of the 12 indicia of supervisory status, whether while engaged in planning duties or when acting as first line supervisors or sporadically performing some arguably supervisory-type duties.

E. Employer Cases Supporting Supervisory Determination are Distinguishable

1. “Comparable Utility Workers”

The Employer argues that the planners should be deemed statutory supervisors because Fifth and Tenth circuit cases have found that so-called “comparable utility company employees” were supervisors. These cases, *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001) and *Public Service Company of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001), concern, respectively operations coordinators and transmissions employees, whose duties include preparing and overseeing detailed “switching orders” which indicate for other employees the precise steps to be taken when carrying out certain work. While a portion of the work performed by these employees appears to be similar to planning, it is not by virtue of this planning-type work that the courts of appeals found that these individuals were statutory supervisors.

In *Public Service Company of Colorado*, the “comparable utility workers” who

“directly assign field employees to make repairs as needed” during emergency situations were held to be statutory supervisors because the court rejected the Board’s interpretation of “independent judgment” 271 F. 3d at 1216, 1220. In *Entergy*, the “comparable utility workers” who, inter alia, during nights and weekends, use their independent judgment to responsibly direct on-call employees to report to work and require employees to work overtime, were also deemed supervisors. 253 F.3d 203, 209-10. The facts of these cases make them entirely distinguishable and do not require a finding that the planners at SONGS are statutory supervisors^{18[18]}.

2. NLRB v. Kentucky River Community Care

The Employer is correct in pointing out that the United State Supreme Court decision in *NLRB v. Kentucky River Community Care, Inc.*, broadened the definition of “supervisor.” 532 U.S. 706 (2001). Most significantly to the case at hand, it is important to note that this was accomplished, in part, by a widening of the interpretation of “independent judgment.” The analysis above carefully delineates the types of judgment that, post-*Kentucky River*, are considered “independent” and finds that there is insufficient evidence of any judgments made with respect to assignment and responsible direction of other employees, whether independent or not. As such, the Employer’s argument equating the planners’ utilization of their professional or technical judgment with the exercise of independent judgment fails.

^{18[18]} Moreover, as the board held in *Pathmark Stores, Inc.*, 342 NLRB 378, fn.1 (2004): "It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise...[It] remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed."

III. Conclusion

As discussed above, the Employer has failed to meet its burden of establishing that any of the planners in the proposed unit are statutory supervisors. Accordingly, I have directed an election in the petitioned-for-unit, which currently consists of approximately 21 planners.

IV. Findings

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find that the following unit is an appropriate unit for the purposes of collective bargaining:

All supervisor 2/planners in the mechanical planning group, electrical planning group, test technician/HVAC planning group, and I & C (Instrumentation and Control) planning group employed by the Employer at the San Onofre Nuclear Generation Station (SONGS), San Clemente, California; excluding all other employees, office clerical employees, professional employees, employees from procedure teams, employees on temporary work assignment (TWA), employees from third party contractors or agencies, confidential employees, managers, guards and supervisors as defined in the Act.

V. DIRECTION OF ELECTION^{19[19]}

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 47, AFL-CIO-CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this decision.

A. Voting Eligibility

Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic

^{19[19]} Petitioner has 10 days from the issuance of this decision to either make a sufficient showing of interest in the unit herein found appropriate, or to withdraw his petition. If he does neither by August 25, 2008, I intend to dismiss the petition due to lack of sufficient showing of interest in the appropriate unit.

strike which commenced more than 12 months before the election date and who have been permanently replaced are ineligible to vote.

B. Employer to Submit List of Eligible Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). This list must be in sufficiently large type to be clearly legible. I shall use this list initially for the administrative investigation into the showing of interest. I shall, in turn, make the list available to all parties to the election, only after I have determined that an adequate showing of interest has been submitted.

In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017-5449, **on or before August 22, 2008**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (213) 894-2778. Since the list is to be made available to all parties to the

election, please furnish a total of 3 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

C. Notice of Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VI. Notice of Electronic Filing

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" in the National Labor Relations website: www.nlr.gov

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by 5:00 p.m., EDT, on August 29, 2008. This request may **not** be filed by facsimile.

DATED at Los Angeles, California this 15th day of August, 2008.

/S/[James F. Small]
James F. Small, Regional Director
National Labor Relations Board
Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017
